INDEX

AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 319

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CHENEY CALIFORNIA LUMBER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The *per curiam* opinion of the Circuit Court of Appeals (R. II 349)[1] is reported in 149 F. 2d 333. The findings of fact, conclusions of law, and order of the Board (R. I 10–51) are reported in 54 N. L. R. B. 205.

JURISDICTION

The decree of the court below (R. II 350) was entered on March 31, 1945. A petition for rehearing, filed by the Board, was denied on May 14,

[1] "R. I." denotes references to the "Transcript of Record," and "R. II" to the "Supplemental Transcript of Record."

1945 (R. II 351). The petition for a writ of certiorari was filed on August 13, 1945 and was granted on October 22, 1945 (R. II 353). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and on Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

When an employer violates Section 8 (1) and (3) of the National Labor Relations Act by discriminatorily discharging four employees and violates Section 8 (1) of the Act by repeated and varied threats of economic reprisal for union activity and by granting economic benefits in return for abandonment of the union, may the Board properly enter an order which not only requires the employer to cease and desist from discrimination but also to cease and desist from "in any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act."

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49

Stat. 449, 29 U. S. C. 151, *et seq.*) are set out in the Appendix, *infra*, pp. 32–34.

STATEMENT

Upon the usual proceedings, the Board on December 30, 1943, issued its findings of fact, conclusions of law, and order (R. I 10–51). The pertinent facts, as found by the Board and shown by the evidence, may be summarized as follows:[2]

The Company's employees became interested in unionization in the early fall of 1942, a few months after the Company began to operate the Greenville, California, sawmill (R. I 17; 60–61, 115, 126–127). In September of that year, approximately seventeen or eighteen mill employees signed application cards for membership in Lumber and Sawmill Workers, Local 4726, affiliated with the American Federation of Labor, hereinafter referred to as the Union (R. I 17; 126–127, 135).

On or about September 20, 1942, Pease, the general manager of the mill, called a meeting of all employees and urged them not to join a union (R. I 17–18; 127, 135–136, R. II 272–273, 311–312). Pease advised the group that some of the employees would suffer a loss of wages if the men joined the Union and a union scale were adopted (R. I 18; 127, 136, R. II 272–273). After the

[2] In the following statement, references preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

meeting, one of the employees asked Pease "what he had against the Union". Pease told him that he didn't like unions and that he did not "want a * * * thing to do with them" (R. I 17–18; 128). Another employee, during a conversation with Pease which took place following the meeting, asked him "if he knew what he was doing in regards to fighting the Union", to which Pease replied that "he didn't care much what he was doing" (R. I 20; R. II 281–282).[3] Pease also told employee Glenn who was then opposed to the Union, "Glenn, before I would operate under the Union, under the contract, I'd shut the * * * thing down air tight" (R. I 19–20; R. II 313).

Sometime before the seasonal shut-down of the mill in December 1942,[4] Pease called a second meeting of the employees (R. I 20–21; R. II 273, 319–320), at which the employees decided that their main objective in organizing was seniority (R. I 20–21; R. II 273–274). Pease thereupon told the men that he would grant them seniority rights and asked that a committee of three em-

[3] From the context of the above conversation it is clear that the employee was expostulating to Pease that the latter was, by his conduct and statements, violating the "Wagner Act" and that Pease's reply to this expostulation was that he didn't "care much" if he were (R. II 281–282).

[4] Because of unsuitable weather, the sawmill practically shuts down each season from about December to March (R. I 87–88, R. II 279).

ployees be appointed to "decide which ones should have seniority" and "which ones should have certain jobs" (R. I. 20–21; R. II 273–274, 319–320). The men, in return, informed Pease that they would "just drop the case of the Union" (R. I 20–21; R. II 273–274). The employees appointed a seniority committee which thereafter conferred with Pease (R. I 21; R. II 274, 320–321). Pease submitted to the committee a working agreement which was accepted by the men (R. I 21; R. II 321–322). The employees thereupon abandoned their attempts to achieve self-organization and ceased discussing the Union (R. I 22; 129, 136–137).

When the union movement was revived at the mill in the spring of 1943 (R. I 22, 25; 67–68, 81–83, 143–144, 146–147), employees Ware, Block, and Norberg were among its most outspoken advocates (R. I 25; 68, 96–98, 143–145). Shortly before March 18, 1943 (see R. I 152–153, 157, R. II 289), Foreman Higday accused Norberg, Ware, and Block of "trying to cause trouble" by bringing "the Union in" and advised them to "go some other place" if they "didn't like where [they were] working" (R. I 25–26; 143–144, 146–148). A day or so after this discussion, Pease called Norberg to his office and warned him that he, Block, and Ware were "talking too much," that he was going to dismiss Block and Ware, and that if Norberg did not "stop talking too much

about things," he would have to dismiss Norberg also (R. I 26; 144–145, 148–149, 153). Thereafter, Pease told Norberg's brother that Norberg, Ware, and Block were "doing too much talking," that Ware was "stirring up too much trouble trying to get the men organized," that he was going to discharge Block and Ware,[5] and that he would discharge Norberg if he "didn't quit talking so much" (R. I 26; II 269–272).

On March 24th and 25th, a majority of the employees signed applications for membership in the Union (R. I 22; 67–68, 82–84). The Union organizer advised Pease of this fact and asked him to negotiate a contract with the Union (R. I 22; 69–71, 83–85, R. II 285). Pease challenged the Union's majority and suggested that the Board conduct an election (R. I 22–23; 70–71, 84–86, R. II 285), but threatened to close the mill before permitting it to "go Union" (R. I. 22–23; 70, 85).

After the Union filed a petition for investigation and certification of representatives pursuant to Section 9 of the Act, the Company agreed to have a consent election conducted at the mill on June 2 (R. I. 24; 73–75, 79, 191–192, 208). On account of protests by Allan and other employees, the date of the election was, however, advanced

[5] When Ware and Block first returned to work after this announcement, Pease discharged them (R. I 28, 31; 101–106, 153–158). These discharges, which the Board found were discriminatory (R. I 29, 32, 45), are discussed, *infra*, pp. 8-9.

to May 22 (R. I 24, 38; 79–81, 91, 191–192, 208–210). On the eve of the election the Company discharged employees Allan and Glenn[6] (R. I 24, 39; 196–200, R. II 343–347). Glenn and Allan voted in the election, but their eligibility was challenged by the Company on the ground that they had been discharged for cause (R. I 24, 39; 76–77, 200–201, 257–260, R. II 347), and consequently their votes were segregated and were not counted (R. I 24; 77, 201, 257–260, R. II 347). Without these votes, which were conceded to be in favor of the Union (R. I 259–260), the tally was 16 for the Union and 16 against it (R. I 24; 77, 258).[7]

The Board found that by the anti-union statements and activities of General Manager Pease

---

[6] These discharges, which the Board found were discriminatory (R. I 41.45), are discussed, *infra*, pp. 9–10.

[7] The challenged ballots remained unopened pending a decision by the Board in the instant case. After the Board issued its decision in the instant case, finding that Allan and Glenn had been discriminatorily discharged (*infra*, pp. 9–10), the regional director, on January 4, 1944, opened the challenged ballots, which were for the Union, counted them, and, on February 11, 1944, issued a Consent Determination of Representatives deciding that the Union was the exclusive representative of all the employees in the agreed unit. Thereafter, charges of violation of Sections 8 (1) and (5) were filed with the Board, a new complaint based thereon issued, and on July 10, 1945, the Board issued its decision finding that the Company had violated Section 8 (1) and (5) of the Act and ordered the Company to bargain with the Union. *Matter of Cheney California Lumber Company*, 62 N. L. R. B., No. 160.

and Foreman Higday, the Company interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8 (1) (R. I 45, 47–48).

Ware had been a member of the American Federation of Labor for about three and one-half years, and he regularly wore a union button while working for the Company (R. I 30; 96–97). Ware and Block were in the forefront of the movement to revive the Union at the mill (*supra*, p. 5). Block joined the Union on March 24, 1943 (R. I 27; 68, R. II 290–291), and Ware signed another designation card for the Union on that date and aided the Union organizer in signing up other employees (R. I 30; 68, 97–98). By their organizational activities, Ware and Block incurred the enmity of Foreman Higday and General Manager Pease, and the latter stated to Norberg and his brother his intention to discharge Ware and Block for their union activities (*supra*, pp. 5–6). Immediately upon their return to work after this announcement, Ware and Block were discharged by Pease (R. I 28, 31; 101–106, 153–158). There is, as the Board found, no evidence in the record to support the reasons assigned by the Company for the discharges of Ware and Block (R. I 28–29, 31–32). The Board found that the Company discharged both Ware and Block because they had engaged in union activities (R. I 29, 32) and that the Company

thereby discouraged membership in the Union in violation of Section 8 (3) and (1) of the Act (R. I 45, 47–48).

Allan was a member of the United Brotherhood of Carpenters and Joiners when he was hired by the Company and he informed Pease of that fact when he reported for work (R. I 36, 38; 179, 187). On April 15th, Allan signed a membership application in the Union and thereafter solicited on its behalf (R. I 38; 187–190). Glenn joined the Union on March 27, 1943 (R. I 34; 160, R. II 314–315) and informed Pease of that fact (R. I 34–35; R. II 315–316). Thereafter, Pease, who had formerly been friendly to Glenn, would pass him without speaking (R. I 35; R. II 318–319). Glenn solicited on behalf of the Union and succeeded in signing up eleven employees (R. I 35; R. II 327–328). He also wore his union button, and Foreman Higday maligned him for doing so (R. I 35–36; R. II 328, 329). On May 19th, the agreement for holding a consent election was signed, and at Allan's request, the time for holding the election was advanced to May 22nd (*supra,* pp. 6–7). At this time also, Glenn was appointed the Union's observer in the forthcoming election (R. I 24, 36; 75). On May 21, Allan and Glenn were discharged (R. I. 39; 196–197, R. II 343). The termination slips issued to them on May 21 or 22 stated falsely that they had "left voluntarily" (R. I 39; 198–200, R. II 346). The Board found that the Company discharged

both Glenn and Allan because of their union activities and in order to influence, adversely to the Union, the election held by the Board to determine the bargaining representative of the Company's employees (R. I 41), and that the Company thereby discouraged membership in the Union in violation of Section 8 (3) and (1) of the Act (R. I 45, 47–48).

The Board ordered the Company to "1. Cease and desist from: (a) discouraging membership in Lumber and Sawmill Workers Local 2647, affiliated with the American Federation of Labor, or in any other labor organization of its employees by discharging or refusing to reinstate any of its employees, or by discriminating in any other manner in regard to their hire and tenure of employment or any term or condition of their employment; (b) in any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act." 2. Take the following affirmative action: (a) offer immediate and full reinstatement to the four employees; (b) "Make whole [the four employees] for any loss of pay they have suffered by reason of the respondent's

discrimination against them, by payment to each of them of a sum of money equal to the amount which he normally would have earned as wages from the date of his discharge to the date of the respondent's offer of reinstatement, less his net earnings during said period"; (c) post notices; (d) notify the Regional Director for the Twentieth Region what steps the Company has taken to comply with the Board's order (R. I. 11–13).

On May 20, 1944, the Board petitioned the court below for enforcement of its order (R. I. 51–55). The Company having failed to appear, the Board, on February 10, 1945, moved the court below to enter a decree enforcing its order. On March 26, 1945, the Company answered the Board's motion, by proposing certain amendments to the form of decree submitted by the Board. Among the modifications proposed by the Company were the deletion of paragraph 1 (b) of the Board's order and the addition to paragraph 2 (b) of a proviso "to the effect that, as used in that paragraph, the term 'loss' means loss actually incurred, and the term 'net earnings' includes those which the employee could have earned, but has, without excuse, failed to earn."

On March 31, 1945, the court below handed down its *per curiam* opinion and entered a decree modifying the Board's order, *inter alia*, by striking out all of paragraph 1 (b), by adding to

paragraph 2 (b) the words "provided that, as used in this paragraph, the term 'loss' means loss actually incurred, and the term 'net earnings' includes those which the employee could have earned, but has, without excuse, failed to earn," and by striking from paragraph 2 (c) all references to paragraph 1 (b), and enforcing the Board's order as modified (R. II 350).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In holding that the Board had no power in the circumstances of this case to enter an order in terms which required the Company to cease and desist from "in any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act."

2. In refusing to enforce, and in modifying or setting aside, paragraphs 1 (b) and 2 (c) of the Board's order.

In the petition for a writ of certiorari filed in this case (pp. 12–13, 21–23), we contended that the court below had also erred in modifying paragraph 2 (b) of the Board's order by providing

that, in computing back pay, such amounts as an "employee could have earned but has, without excuse, failed to earn" (R. 349) should be deducted from the amount which the employee "would have earned as wages from the date of his discharge to the date of respondent's offer of reinstatement" (R. II 350). In support of our view, we relied primarily on this Court's holding in *Phelps Dodge Corp* v. *National Labor Relations Board,* 313 U. S. 177, 200, to the effect that a circuit court of appeals should not, itself, insert such a provision in the decree, but should, instead, leave the matter to the Board for determination by it prior to the formulation of its order. We urged in addition, that the issue of wilful losses had not been raised before the Board and that therefore, no "extraordinary circumstances" being present, the circuit court of appeals could not entertain this issue. Cf. *Marshall Field & Co.* v. *National Labor Relations Board,* 318 U. S. 253, 255-256.

Since the petition for a writ of certiorari was filed, more intensive study of the printed record in this case and reference to portions of the typewritten transcript which are not included in the printed record have raised a question in our minds as to whether the issue was not, in fact, raised before the trial examiner and whether he did not discourage presentation of the issue at that stage of the proceedings (see R. I 112-113). While we still believe that the court below erred in its

action regarding paragraph 2 (b) of the order, we have decided, under the circumstances, not to press this matter in this case.

SUMMARY OF ARGUMENT

The inclusion by the Board of paragraph 1 (b) in its cease and desist order, enjoining the Company from "in any manner interfering with, restraining, or coercing its employees in the exercise of the" rights guaranteed in Section 7 of the Act, was, in the circumstances of this case, an appropriate exercise of the Board's remedial powers. The court below was in error when it deleted paragraph 1 (b) from the order.

The Company, by discriminatorily discharging four employees; by its repeated and varied threats of economic reprisal for union activities; and by granting economic benefits to induce abandonment of the Union, violated Section 8 (1) and (3) of the Act. The broad scope and serious nature of these violations demonstrated the Company's determination to deny its employees all of their rights under the Act by whatever means was necessary to achieve that end. The Company's conduct in actually depriving employees of their livelihood in order to crush organizational activities, as well as its threats of other drastic measures if necessary to defeat self-organization, and its explicit declaration that it did not "care much" that it was violating the statutory rights of its employees, afford a reasonable basis upon

which to apprehend that the Company will commit further unfair labor practices, in unpredictable forms, unless restrained therefrom by court order.

The conduct of the Company as above described fully meets the test for the use of a broad form of cease and desist order laid down by this Court in *May Department Stores Co.* v. *National Labor Relations Board,* No. 39, this Term, and *National Labor Relations Board* v. *Express Publishing Co.,* 312 U. S. 426, 432–438, for the Company's unfair labor practices indicated "an attitude of opposition to the purposes of the Act" (*May* slip opinion, p. 13) and were so serious, fundamental, and varied as to bespeak a "threat of continuing and varying efforts to attain the same end in the future" (312 U. S. at 438).

Moreover, the unfair labor practices found in the instant case violate all of the rights guaranteed by Section 7 of the Act. The discharge of employees on the eve of an election in order to prevent the Union from achieving a majority vote not only invaded the employees' right to self-organization, but also violated their right to bargain collectively, and to select representatives of their own choosing. The Company's conduct also invaded the employees' right to engage in concerted action for the purpose of other mutual aid and protection, since the unfair labor practices were directed to the end of preventing the employees from taking any sort of collective ac-

tion on their own behalf. Moreover, the Company's conduct not only interfered with, but also coerced and restrained, its employees in the exercise of those rights.

A restoration of paragraph 1 (b) of the Board's order is necessary in order to enjoin a repetition of the same class of unfair labor practices as have already been committed by the Company.

PRELIMINARY STATEMENT AS TO THE POWER OF THE COURT BELOW TO CONSIDER THE SCOPE OF THE BOARD'S ORDER

In footnote 5 of the opinion in *May Department Stores Co.* v. *National Labor Relations Board*, No. 39, this Term, decided December 10, 1945, this Court, *sua sponte*, examined into the record in that case to determine whether, under Section 10 (e) of the Act (Appendix, *infra*, p. 34), the circuit court of appeals had the power to review paragraph 1 (b) of the Board's order, a provision identical with that here in question.

It was determined in that case that the Company had taken sufficient objection before the Board to the paragraph in issue, and that, therefore, the circuit court of appeals had power to review its propriety. But in this case, while paragraph 1 (b) was contained in the trial examiner's proposed order (R. I 48), the Company at no time made objection to its provisions before the Board. It may well be, therefore, that the court below was without power to delete paragraph 1 (b) and mod-

ify paragraph 2 (c) by removing all references therein to paragraph 1 (b), and that, for this reason alone, the judgment of the court below should be reversed in this respect.

ARGUMENT

The Board had authority to insert the cease and desist provisions which were stricken from its order by the court below

In the case at bar, the unfair labor practices found to have been committed evinced the Company's determination to frustrate its employees in the exercise of all the rights guaranteed them under the Act. As soon as the employees began to organize, the Company's general manager expressed his opposition to their concerted activities, said he would have no dealings with a union, and threatened to shut the mill "down air tight" rather than operate "under the Union" (*supra*, pp. 3–4). When an employee expostulated that the manager was violating the Act, the latter stated that he did not "care much" what he was doing (*ibid.*). True to this explicit declaration of the Company's purpose to defeat the organizational efforts of its employees regardless of the law, it thereafter resorted to numerous and varied forms of unfair labor practices. The Company granted the employees a seniority system (which it knew to be their main objective in organizing) and thereby, for a time, induced the employees to abandon their organizational activities (*supra*, pp.

4–5). When the union movement was resumed, the Company threatened to discharge the leaders of that movement and when union organization nevertheless achieved some success, the Company threatened to close the mill before permitting it to "go Union" (*supra*, pp. 5–6). When the employees still persisted in their union activities, the Company discriminatorily discharged four of the leading union adherents (*supra*, pp. 8–10). Two of these discharges occurred on the eve of the election held pursuant to the Union's petition for investigation and certification of representatives and were obviously designed to defeat the Union in the election (*supra*, pp. 7, 9–10).

On these facts, the Board properly found that the Company, by its repeated and varied threats of economic reprisal for union activities, its grant of economic benefits to induce abandonment of the Union, and by its discriminatory discharges of four employees, violated Section 8 (1) of the Act, and that, by the discriminatory discharges, it violated Section 8 (3). The Company is thus seen to have violated, not only the specific statutory prohibition against "discrimination in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization" (Section 8 (3)), but in addition, by these discharges as well as by other varying forms of conduct, the Act's general proscription embodied in Section 8 (1), against interfering with, restraining, or coercing employees in the exercise

of [the following rights enumerated in Section 7, *viz.*] "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Pursuant to the mandate of Section 10 (a) and (c) of the Act (Appendix, *infra*, pp. 32, 33),[8] the Board's order contained two cease and desist provisions—one prohibiting a repetition of violations of Section 8 (3) (R. I. 11), and the other enjoining future violations of Section 8 (1) (R. I. 11–12). Section 8 (1), as we have seen, comprises a general proscription against interference, restraint, or coercion on the part of an employer, against the exercise by his employees of the rights granted in Section 7. The prohibition of this Section is necessarily "broadly phrased," as this Court has said, because "in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act". *Phelps Dodge Corporation* v. *National Labor Relations Board*, 313 U. S. 177, 194. In framing its cease and desist order in the instant

[8] Section 10 (a) empowers the Board "to prevent any person from engaging in any unfair labor practice (listed in section 8)," and Section 10 (c) directs the Board to "issue and cause to be served on [any person found to have engaged in any unfair labor practice] an order requiring such person to cease and desist from such unfair labor practice."

case, the Board enjoined further violations of Section 8 (1) in the same broad terms, ordering the Company (R. I. 11–12) to "1. Cease and desist from:"

> (b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

Despite the fact that in this paragraph of its cease and desist order, the Board literally complied with the statutory command to enjoin "such unfair labor practice"—the violation of Section 8 (1)—the court below, in striking the paragraph entirely, deleted from the Board's order all of the prohibitory provisions which were not related to discrimination with respect to employment, thus leaving the Company free to commit any unfair labor practice, other than discrimination, in violation of Section 8 (1) at no risk of violating the court's decree. The authority cited by the court below for its deletion of paragraph 1 (b) is the opinion of this Court in *National Labor Relations Board* v. *Express Publishing Company*, 312 U. S. 426, 432–438. We respectfully submit that the court below misinterpreted this Court's holding in that case.

In the *Express Publishing* case, the Fifth Circuit Court of Appeals had set aside the Board's finding that the Company had violated Section 8 (1) by making certain statements to its employees. See 312 U. S. at 428, note 1; and 441, note 2, in the dissenting opinion. All that remained to support the Board's order, worded in terms substantially the same as those of paragraph 1 (b) of the order in the instant case, was the finding that the Company had refused to bargain with the Union, thereby violating Section 8 (1) and (5). This Court noted that aside from refusing to bargain with the Union, the Company had "In all other respects * * * consistently left the [Union] and its activities undisturbed" (312 U. S. at 434). It held, therefore, that the violation of Section 8 (5) constituted merely a "technical violation" of Section 8 (1), and that that type of Section 8 (1) violation did not warrant a broad order to cease and desist from violating Section 8 (1) (p. 433). The Court pointed out that (312 U. S. at 434):

> The Board made no finding and there is nothing in the record to suggest that the failure of the bargaining negotiations and all that attended them gave any indication that in the future respondent would engage in all or any of the numerous other unfair labor practices defined by the Act.

But here the court below sustained the Board's findings that the Company had discouraged mem-

bership in the Union by discriminatorily discharging four employees. This was not merely a technical violation of Section 8 (1). On the contrary, it was one of the most far-reaching violations of Section 8 (1) that can be envisioned. Thus, prior to the decision in the *Express Publishing* case, the Court of Appeals for the District of Columbia and all of the circuit courts of appeals had uniformly enforced orders containing a provision similar to paragraph 1 (b) of the Board's order herein in every case involving a violation of Section 8 (3) of the Act. The Circuit Court of Appeals for the Second Circuit, in a case in which it expressed doubt as to whether a mere violation of Section 8 (5) would justify such a provision in an order, enforced the provision on the express ground that the case also involved violations of Section 8 (3), pointing out that the discriminatory discharge of employees "was probably the primary wrong against which section 8 (1) * * * was directed." *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 869, certiorari denied, 304 U. S. 576, 585.[9]

[9] See also *National Labor Relations Board* v. *Willard, Inc.*, 98 F. 2d 244 (App. D. C.); *National Labor Relations Board* v. *Waumbec Mills, Inc.*, 114 F. 2d 226, 231, 234 (C. C. A. 1); *National Labor Relations Board* v. *Somerset Shoe Co.*, 111 F. 2d 681, 691 (C. C. A. 1); *National Labor Relations Board* v. *Fashion Piece Dye Works*, 100 F. 2d 304 (C. C. A. 3), enforcing 1 N. L. R. B. 285, 290; *National Labor Relations Board* v. *Washington, Virginia and Maryland Coach Co.*, 85 F. 2d 990 (C. C. A. 4), affirmed, 301 U. S. 142; *Agwilines*,

Since the *Express Publishing* decision, the Circuit Courts of Appeals for the First, Second, Fourth and Tenth Circuits have enforced broad orders in all cases involving violations of Section 8 (3).[10] The Circuit Court of Appeals for the Fourth Circuit has pointed out that such a "blan-

---

Inc. v. *National Labor Relations Board*, 87 F. 2d 146, 148, 153 (C. C. A. 5); *National Labor Relations Board* v. *Kentucky Fire Brick Co.*, 99 F. 2d 89, 91, (C. C. A. 6); *National Labor Relations Board* v. *Goshen Rubber & Mfg. Co.*, 110 F. 2d 432 (C. C. A. 7); *National Labor Relations Board* v. *Viking Pump Co.*, 113 F. 2d 759 (C. C. A. 8), certiorari denied, 312 U. S. 680, enforcing 13 N. L. R. B. 576, 592; *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. 2d 465, 469, 470 (C. C. A. 9); *Southern Colorado Power Co.* v. *National Labor Relations Board*, 111 F. 2d 539, 541 (C. C. A. 10).

[10] *National Labor Relations Board* v. *Brezner Tanning Co., Inc.*, 141 F. 2d 62, 65 (C. C. A. 1); *National Labor Relations Board* v. *Van Deusen*, 138 F. 2d 893, 895–896 (C. C. A. 2); *National Labor Relations Board* v. *Air Associates*, 121 F. 2d 586, 592 (C. C. A. 2); *National Labor Relations Board* v. *Sandy Hill Iron & Brass Works*, 145 F. 2d 631 (C. C. A. 2); *National Labor Relations Board* v. *Collins & Aikman Corp.*, 146 F. 2d 454, 456–457 (C. C. A. 4); *National Labor Relations Board* v. *Entwistle Mfg. Co.*, 120 F. 2d 532, 536 (C. C. A. 4); *Jacksonville Paper Co.* v. *National Labor Relations Board*, 137 F. 2d 148 (C. C. A. 5), certiorari denied, 320 U. S. 772; *National Labor Relations Board* v. *Fairmont Creamery Co.*, 143 F. 2d 668 (C. C. A. 10), certiorari denied, 323 U. S. 752; *National Labor Relations Board* v. *Armour and Company.*, 17 L. R. R. 372, 376 (C. C. A. 10). The Circuit Court of Appeals for the Third Circuit has interpreted the *Express Publishing* decision to requite it to omit the broad order where there is no other unfair labor practice than a violation of Section 8 (3) (*National Labor Relation Board* v. *Newark Morning Ledger Co.*, 120 F. 2d 262, 269), although that court enforces broad orders regularly where there are violations of Section 8 (1) much less serious than that involved in Section

ket order" is justified, since "a discriminatory discharge of an employee because of his union affiliations goes to the very heart of the Act." *National Labor Relations Board* v. *Entwistle Mfg. Co.*, 120 F. 2d 532, 536.

When the discriminatory discharges are considered together with the threats that the Company was not going to deal with the union even if it had to shut down its business, they afford irrefutable basis for apprehending future violations of every right guaranteed by Section 7 unless the hand of the law intervenes. The threats themselves as well as the discharges were aimed specifically not only at the "right to self organiza-

---

8 (3) violations. *National Labor Relations Board* v. *Trojan Powder Co.*, 135 F. 2d 337, enforcing 41 N. L. R. B. 1308, 1325, certiorari denied, 320 U. S. 768; *National Labor Relations Board* v. *Phillips Gas & Oil Co.*, 141 F. 2d 304, 306, enforcing 51 N. L. R. B. 376. The Circuit Courts of Appeals for the Sixth, Seventh and Eighth Circuits have sometimes enforced such orders in such a situation (*National Labor Relations Board* v. *Bersted Mfg. Co.*, 128 F. 2d 738 (C. C. A. 6), modifying 124 F. 2d 409, 412; *National Labor Relations Board* v. *Walworth Co., Inc.*, 124 F. 2d 816, 818 (C. C. A. 7); *Wilson & Co., Inc.*, v. *National Labor Relations Board*, 124 F. 2d 845, 848 (C. C. A. 7); *American National Bank of St. Paul* v. *National Labor Relations Board*, 144 F. 2d 268 (C. C. A. 8), enforcing 52 N. L. R. B. 905, 907) and have, on other occasions, modified the order. *National Labor Relations Board* v. *Cleveland Cliff Iron Co.*, 123 F. 2d 295, 302 (C. C. A. 6); *National Labor Relations Board* v. *Servel, Inc.*, 149 F. 2d 542 (C. C. A. 7); *Wilson & Co.* v. *National Labor Relations Board*, 123 F. 2. 411, 419–420 (C. C. A. 8). Cf. *Press Co., Inc.* v. *National Labor Relations Board*, 118 F. 2d 937 (App. D. C.), in which Mr. Justice Rutledge dissented at p. 957.

tion" but also at the "right to form, join, and assist labor organizations", the "right to bargain collectively", and the right "to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection" (R. I 11–12). Consequently, under the principles announced by this Court in the *Express Publishing* decision, paragraph 1 (b) of the Board's order herein should have been enforced in full. For the *Express Publishing* opinion states (312 U. S. at 436–437):

> Having found the acts which constitute the unfair labor practice the Board is free to restrain the practice and other like or related unlawful acts. * * * The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past.

Other cases in which this Court had enforced broad cease and desist orders substantially similar to paragraph 1 (b) of the Board's order herein, were distinguished in the *Express Publishing* opinion on the ground that such orders were justified in those cases because (312 U. S. at 437–438):

> the record disclosed persistent attempts by varying methods to interfere with the right of self-organization in circumstances

> from which the Board or the court found or could have found the threat of continuing and varying efforts to attain the same end in the fture."[11]

While this Court indicated, in the *Express Publishing* case, that a refusal to bargain collectively did not in itself necessarily indicate that the employer would engage in a general attack on the right to self-organization, the converse is not true. A general attack on the right to self-organization is necessarily an interference with the right to bargain collectively. "Union [is] essential to give laborers opportunity to deal on equality with their employer." *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184, 209; *Texas and New Orleans Railroad Co.* v. *Brotherhood of Railway & Steamship Clerks,* 281 U. S. 548, 570; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 33–34; *Phelps Dodge Corp.* v. *National*

---

[11] This Court, since issuing that opinion, has enforced cease and desist orders identical with the one here involved where, as in the instant case, the Board had found that the employer had discriminatorily discharged employees or engaged in other conduct interfering with, restraining, or coercing employees in the exercise of their right to self-organization. See *National Labor Relations Board* v. *Automotive Maintenance Machinery Co.*, 315 U. S. 282, enforcing 13 N. L. R. B. 338, 362; *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685, enforcing 18 N. L. R. B. 591, 640; *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105, enforcing 26 N. L. R. B. 1182, 1235.

Labor Relations Board, 313 U. S. 177, 183. But "such collective action would be a mockery if representation were made futile by interferences with freedom of choice." *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway & Steamship Clerks, supra; National Labor Relations Board* v. *Jones & Laughlin Steel Corp., supra,* at 34; cf. *Express Publishing* case, *supra,* at 437. In the instant case, the employer's interference with the right to self-organization constituted the plainest sort of interference with the employees' right to bargain collectively. For by discriminatorily discharging two active union adherents on the eve of the election and challenging their ballots at the election (*supra,* pp. 7, 9–10), the Company attempted to prevent the Union from obtaining a majority of the votes cast and sought thereby to deprive the employees of their right to collective bargaining. Consequently, a broad cease and desist provision was justified in the instant case because the Company not only engaged in a general attack upon the employees' right to self-organization but also interfered with their right to bargain collectively.

Finally, it is apparent that by its interference with the right of its employees to self-organization, the Company also transgressed their right to "engage in concerted activities for the purpose of * * * other mutual aid or protection," since the unfair labor practices were directed to

the end of coercing the employees into refraining from any sort of collective action on their own behalf. In this connection, it should be noted that the Company's conduct did not merely "interfere with" the rights of its employees; it was coercive in the extreme, and in addition, as we have seen, "restrained" the employees from the exercise of their rights under the Act. The unfair labor practices in this case consequently encompass the entire range of the language and meaning of Section 8 (1) of the Act.

It is clear, then, that this case, unlike *May Department Stores* v. *National Labor Relations Board*, No. 39, this Term, is not one in which the violation of Section "8 (1) is so intertwined" with a "refusal to bargain" as to make improper a broad cease and desist order, and that the Company here exhibited an "attitude of opposition to the purposes of the Act to protect the rights of employees generally". Slip opinion, p. 13.

We have shown that the court below, in striking paragraph 1 (b) entirely from the Board's order, deleted *all* of the prohibitory provisions as to those Section 8 (1) violations which did not constitute discrimination with respect to hire and tenure of employment. Consequently, it not merely failed to follow the *Express Publishing* case (312 U. S. at 436–438) by prohibiting future violations of the Act related to past violations and reasonably foreseeable therefrom, but also

failed to prohibit future violations *identical* to those of which the Board and the court had just found the Company guilty. Thereby the court eliminated a cease and desist provision which the Act *requires* the Board to include in its order—namely, one directed to unfair labor practices of which the employer has been found guilty. See National Labor Relations Act, Section 10 (c) (Appendix, *infra*, p. 33); *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 265; *Express Publishing* case, *supra*, at 432.

It is thus apparent that restoration of some form of cease and desist provision addressed to future violations of Section 8 (1) is mandatory. For a discussion of the possible alternatives in framing such a cease and desist provision, we respectfully refer the Court to our brief filed with it in *May Department Stores* v. *National Labor Relations Board*, No. 39, this Term, pp. 42–61. Suffice it to say here that the Company has manifested a determination generally to flout the statutory rights of its employees, and that the type of order adopted by this Court in the *May* case, protective of the union alone, would be inadequate in this case since the Company's interference, restraint, and coercion were directed primarily at the employees themselves and not at the Union alone through a refusal to bargain. The inference is inescapable that the commission of further unfair labor practices by the Company, in unpre-

dictable forms, is reasonably to be expected in the event that its employees should again attempt to exercise their rights under the Act. In the face of this reasonable probability, nothing but a broad cease and desist order such as is embodied in paragraph 1 (b) of the Board's order herein would be sufficient to protect the Company's employees in the enjoyment of those rights. To enjoin merely a repetition of the specific forms of unfair labor practices hitherto committed would put a premium on the ingenuity of the Company in devising different methods of attaining its demonstrated and tenacious purpose of thwarting its employees in the exercise of their rights under this Act.

In our brief in the *May* case, *supra,* we discuss the enervating consequences on the Act in cases of this sort were the Board to be required to limit its cease and desist orders to prohibitions of the identical unfair practices previously committed. For that discussion we respectfully refer the Court to pp. 47–49 of the *May* brief. Similarly, to avoid repetition, we shall not here discuss the cases decided under other statutes which provide for the use of injunctive orders, and the administrative practice of other agencies, but shall, instead, refer to pp. 49–52 of the *May* brief and the opinion of this Court in that case. Pp. 11–12 of the slip opinion.[12]

[12] See also the breadth of the injunction sustained by this Court in *Hague* v. *C. I. O.*, 307 U. S. 496, 517, under general equity principles.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below, insofar as it fails to enforce and modifies the order of the Board by striking therefrom paragraph 1 (b) and all references in paragraph 2 (c) to paragraph 1 (b), should be reversed, and the cause remanded with directions to enforce these provisions of the order.

J. HOWARD MCGRATH,
Solicitor General.

DAVID A. MORSE,
General Counsel,
RUTH WEYAND,
ISADORE GREENBERG,
Attorneys,
National Labor Relations Board.

DECEMBER 1945.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. Sec. 151, *et seq.*) are as follows:

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means

of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in

such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1949

SUPREME COURT OF THE UNITED STATES.

No. 319.—October Term, 1945.

National Labor Relations Board, Petitioner, *vs.* Cheney California Lumber Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 25, 1946.]

Mr. Justice Frankfurter delivered the opinion of the Court.

Cheney California Lumber Company, the respondent, operated a sawmill at Greenville, California. Some employees of the Company were members of Lumber and Saw Mill Workers, Local 4726, affiliated with the American Federation of Labor. The union complained to the National Labor Relations Board that the Company had engaged in unfair labor practices, in violation of § 8 of the Wagner Act, 49 Stat. 449, 452, 29 U. S. C. § 158. Following the usual procedure, there was a hearing before a trial examiner who made an intermediate report, including specific recommendations for a cease-and-desist order. The Company filed no exceptions to this report, nor did it request an oral argument before the Board. Upon due consideration, the Board adopted the findings, conclusions, and recommendations of the trial examiner. 54 N. L. R. B. 205. Thereupon the Board asked the Circuit Court of Appeals for the Ninth Circuit to enter a decree upon its order. The Company then proposed modifications of the Board's order, which were granted by the court below. 149 F. (2d) 333. The Government petitioned for *certiorari*, urging that one of the changes made by the Circuit Court of Appeals was based on a misconception of *Labor Board* v. *Express Pub. Co.*, 312 U. S. 426, as to the allowable scope of the Board's power "to effectuate the policies" of the Act. § 10(c), 49 Stat. 454, 29 U. S. C. § 160(c). So we brought the case here. 327 U. S. —. Upon the argument, this was the only modification to which the Government objected. We shall not consider the others. The court below struck out from the Board's order paragraph 1(b) whereby the Company was ordered, after appropriate treatment of the unfair labor prac-

tice arising from prohibited discharge of employees, to cease and desist from

> "(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act."

The court found warrant for its excision of this provision in *Labor Board* v. *Express Pub. Co., supra.* That case, however, recognized that it was within the power of the Board to make an order precisely like 1(b). It merely held that whether such an inclusive provision as 1(b) is justified in a particular case depends upon the circumstances of the particular case before the Board. See 312 U. S. at 433, 437-38. Here the trial examiner recommended the inclusion of 1(b) on the basis of his review of past hostilities by the company against efforts at unionization; no exception was made either to the findings or to this recommendation; upon full consideration of the record the Board adopted the trial examiner's recommendation; no objection was raised by the Company until after the Board sought judicial enforcement of its order. The objection came too late.

When judicial review is available and under what circumstances, are questions (apart from whatever requirements the Constitution may make in certain situations) that depend on the particular Congressional enactment under which judicial review is authorized. Orders of the National Labor Relations Board are enforceable by decrees of circuit courts of appeals. In such an enforcement proceeding, a court of appeals may enforce or modify or set aside the Board's order. § 10(e), 49 Stat. 454, 29 U. S. C. § 160(e). Since the court is ordering entry of a decree, it need not render such a decree if the Board has patently traveled outside the orbit of its authority so that there is, legally speaking, no order to enforce. But the proper scope of a Board order upon finding unfair labor practices calls for ample discretion in adapting remedy to violation. We have said that "in the nature of things Congress could not catalogue all the devices and strategems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by

leaving the adaption of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review." *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 194.

A limitation which Congress has placed upon the power of courts to review orders of the Labor Board is decisive of this case. Section 10(e) of the Act commands that "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." We have heretofore had occasion to respect this explicit direction of Congress. *Marshall Field & Co.* v. *Board*, 318 U. S. 253; and see *May Department Stores Co.* v. *Labor Board*, decided December 10, 1945, slip opinion, p. 8, n. 5. By this provision, Congress has said in effect that in a proceeding for enforcement of the Board's order the court is to render judgment on consent as to all issues that were contestable before the Board but were in fact not contested. Cf. *Pope* v. *United States*, 323 U. S. 1. We can say of this case, as was said of the *Marshall Field* case, *supra*, that it "gives emphasis to the salutary policy adopted by § 10(e) of affording the Board opportunity to consider on the merits questions to be urged upon review of its order." *Marshall Field & Co.* v. *Board*, *supra*, at 256. The appropriateness of such a prohibition as the Board's order contains depends, as the *Express Publishing Company* case, *supra*, abundantly shows, upon evidence found by the Board disclosing a course of conduct against which such an order may be the only proper remedy. The Board here so found. Justification of such an order, which necessarily involves consideration of the facts which are the foundation of the order, is not open for review by a court if no prior objection has been urged before the case gets into court and there is a total want of extraordinary circumstances to excuse "the failure or neglect to urge such objection." Congress desired that all controversies of fact, and the allowable inferences from the facts, be threshed out, certainly in the first instance, before the Board. That is what the Board is for. It was therefore not within the power of the court below to make the deletion it made.

Judgment reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 319.—October Term, 1945.

National Labor Relations Board, Petitioner, *vs.* Cheney California Lumber Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 25, 1946.]

Mr. Chief Justice Stone, concurring.

I concur on a ground which the Court's opinion points out and which is alone sufficient to sustain its decision, namely, that the court below erroneously applied *Labor Board* v. *Express Pub. Co.*, 312 U. S. 426. But I cannot say that when the court below was appealed to as a court of equity to enforce by its injunction the Board's order, § 10(e) of the National Labor Relations Act rendered the court powerless to frame its own injunction consistently with the record, on which that section requires it to act, and in conformity to accepted principles governing the scope of the injunction; or that if the tables were turned the section would require the reviewing court to repeat, by the excessive scope of its injunction, the very abuse of power condemned by the *Express Publishing Company* case.

The prohibition by § 10(e) of the court's consideration of objections which the parties did not urge before the Board is a limitation upon the court's review of the grounds for granting or denying relief. This Court has treated it as such. See *Marshall Field & Co.* v. *Board*, 318 U. S. 253. But we have not held that § 10(e) could, and I think it cannot rightly, be construed to be also a limitation on the court's power to conform its own process to accepted legal standards applied to the "entire record" which § 10(e) requires to be filed with it. Nor is that prohibition a command to the court to act as a mere ministerial agency to execute the order of the Board, without regard to those standards which control the court's use of its own process, even though the Board and the parties have ignored them.

Only recently we have held that the imposition of a mandatory duty on a federal court of equity to restrain violations of a statute is not to be taken as depriving the court of its traditional power to administer its remedies according to its own governing principles and in conformity to the standards of public interest. See *Hecht Co.* v. *Bowles*, 321 U. S. 321, 331. In that case we held that a command explicitly addressed to a court of equity, by § 205(a) of the Emergency Price Control Act of 1942, to grant an injunction enforcing the act when violation of it is shown, did not deprive the court of its equitable discretion to grant or withhold an injunction. It has been well said that § 205(a), which directs that the court upon showing of violation "shall" grant the injunction, "does not change the historic conditions for the exercise by courts of equity of their power to issue injunctions." 321 U. S. 331.

It should likewise be held that the present statute does not alter the power of a court of equity to frame its injunction according to equitable principles applied in the light of the record on which it must act. Here the statute is not mandatory. It does not purport to curtail the court's power to define the scope of its process. The section only confers on the court the power to make "a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board". This emphasizes what was implicit in the statute involved in the *Hecht* case, and made explicit by the opinion, that when a statute authorizes an appeal to equity to enforce a liability created by statute, the exercise is invoked of those powers which pertain to it as a court of equity. This at least includes the power to fix, on its own motion, the scope of the decree which it may be required to enforce by contempt proceedings, in conformity to recognized equitable standards applied to the record before it.